

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN MONACO

Claimant

VS.

STERICYCLE, INC.

Respondent

AND

ZURICH AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. **1,027,445**

ORDER

Respondent and its insurance carrier request review of the March 29, 2011 Order entered by Administrative Law Judge Brad E. Avery.

APPEARANCES

Claimant appeared by and through Lynn M. Curtis of Kansas City, Missouri. Respondent and its insurance carrier appeared by and through Terry J. Torline, of Wichita, Kansas.

RECORD AND STIPULATIONS

Neither the Administrative Law Judge (ALJ) in his Order, nor the parties in their briefs identify the record. It appears from the file that the record consists of a transcript from the Regular Hearing, held on December 13, 2010, along with briefs to the Board in support of the respective parties' position in this appeal.

ISSUES

At the regular hearing, the parties agreed to claimant's base wage and respondent further agreed to provide information regarding the value of claimant's fringe benefits. On the date the terminal dates were to expire, the ALJ sent the parties an e-mail noting respondent had agreed to provide the fringe benefit wage information and it had not been received by the ALJ. Apparently, respondent objected to providing that information absent an order from the ALJ.

On March 29, 2011, the ALJ issued an Order directing respondent to provide all average weekly wage information including fringe benefits to opposing counsel and the Court. The ALJ also extended terminal dates for all parties until April 29, 2011.

Respondent requests review of whether the ALJ erred in ordering respondent to provide the value of fringe benefits because claimant's base wage is sufficient to entitle him to the maximum permanent partial disability rate and claimant is not seeking a work disability. Respondent argues there is now no dispute over the value of claimant's fringe benefits and a decision in that regard would merely be a prohibited advisory opinion.

Claimant argues that the ALJ's Order is an interlocutory order which is not final and consequently, not subject to review by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

As noted, this review is from an order directing respondent to provide the value of claimant's fringe benefits. At the regular hearing the following statements, in pertinent part, were made by the ALJ as he recited the stipulations:

There's been an agreement on a base wage of \$865.38. **That does not include fringe benefits and respondent's counsel has proffered that they will provide that information.** No temporary total compensation was paid. There is none claimed. Hospital and medical treatment was furnished in the amount of \$16,669.23 (sic). No outstanding bills, leaving the **issues to be decided by the Court** whether claimant suffered personal injury by accident on the date alleged, whether the alleged accidental injury arose out of and occurred in the course of employment, **the final average weekly wage with benefits**, nature and extent of disability and future and unauthorized medical care. Okay, any additions, modifications or corrections to that record before we proceed? (Emphasis Added)

MR. CURTIS: No, Your Honor.

MR. TORLINE: I don't believe so, Your Honor.¹

When the fringe benefits were not provided the ALJ requested that information and respondent argued the information was not necessary for the decision in the case. The ALJ then issued the following Order:

The respondent is directed to provide all average weekly wage information to include fringe benefits to opposing counsel and the Court. The respondent's counsel indicated at regular hearing that said information would be provided. The Court has not performed the calculations to determine the fringe benefit information is necessary for the resolution of this claim. However, even if it is not, it is the Court's experience that such information is best obtained during the regular hearing

¹ R.H. Trans. at 3-4.

evidentiary period, rather than wait for a potential request for review and modification. Terminal dates are extended for parties until 4/29/11.²

In summary, the respondent's counsel agreed to provide the fringe benefit information. And the ALJ specifically listed the final average weekly wage with benefits as an issue to be determined. Respondent's counsel agreed with the recitation and made no objection to the statements that the fringe benefit information would be provided or the recitation that the final average weekly wage with benefits was an issue. It is disingenuous for counsel to now object to providing the fringe benefit information that he had agreed to provide and to argue that the fringe benefit information is not an issue when the ALJ specifically listed the average weekly wage with benefits as an issue to be determined.

The initial issue that the Board must address in this case is whether the Board has jurisdiction to review the ALJ's Order which ordered respondent to provide all average weekly wage information including fringe benefits. At the regular hearing, respondent had agreed to provide this information.

The Board only has jurisdiction to review "[a]ll final orders, awards, modification of awards, or preliminary hearing awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge."³ It should be noted that the ALJ's Order does not refer to a preliminary hearing. The Board finds that this appeal is not from an order entered pursuant to the preliminary hearing statute.⁴ Stated another way, the order directing respondent to provide all average weekly wage information including fringe benefits does not relate to an award of temporary total disability or medical treatment and is not a preliminary award under K.S.A. 44-534a.

The ALJ's decision to request fringe benefit information is interlocutory in nature and made during the litigation of a worker's compensation case that is before the ALJ. This is neither a final order that can be reviewed pursuant to K.S.A. 44-551 nor an order entered pursuant to the preliminary hearing statute, K.S.A. 44-534a, as preliminary hearing orders are limited to issues of furnishing of medical treatment and payment of temporary total disability compensation.

K.A.R. 51-3-8(c) states:

The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The

² ALJ Order (Mar. 29, 2011).

³ See K.S.A. 2006 Supp. 44-551(b)(1).

⁴ See K.S.A. 44-534a.

administrative law judge shall not be bound by rules of civil procedure or evidence.
Hearsay evidence may be admissible unless irrelevant or redundant.

The appealed Order resulted from a regular hearing and it is an order that did not finally and completely resolve the outstanding compensability issues or address the compensation that might be due. To the contrary, this was an Order specifically intended to memorialize the respondent's agreement to provide fringe benefit information. And that issue was stated by the ALJ as a matter in dispute. The Order now before the Board pertains to an interlocutory matter, over which an ALJ, pursuant to K.A.R. 51-3-8(c), has authority to decide during the litigation of a workers compensation case. Consequently, the Board lacks jurisdiction to review such an order until it is contained in a final order or award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

WHEREFORE, it is the finding of this Board Member that the respondent's appeal of the Order of Administrative Law Judge Brad E. Avery dated March 29, 2011, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lynn M. Curtis, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁵ K.S.A. 2006 Supp. 44-555c(k).